Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

ROBERT M. COY, JR.,
Petitioner,

v.

GLENN W. PHELPS, JR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a claim of excessive force made by a pre-trial detainee for actions that occur after the detainee has been arrested and transported to the police station is properly governed by the Fourth Amendment prohibition against unreasonable seizures or the Fourteenth Amendment guarantee of due process of law.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Robert M. Coy, Jr., an individual citizen of the United States, residing in the Southern District of Ohio. Petitioner has no corporate affiliations. Robert M. Coy, Jr. was a Defendant in the District Court and the Appellant in the Sixth Circuit Court of Appeals.

Respondent

Glenn W. Phelps, Jr. is an individual citizen of the United States, residing in the Southern District of Ohio. Petitioner is unaware of any corporate affiliations of Respondent. Glenn W. Phelps was the Plaintiff in the District Court and the Appellee in the Sixth Circuit Court of Appeals.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS . . . . . iii-iv

TABLE OF CITED AUTHORITIES . . . . . v-vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. The Decision Below Conflicts with Authoritative Decisions of Other Circuits That Have Addressed the Same Issue 4

II. The Question Presented Is Important . . . 6

III. The Decision of the Sixth Circuit Is Incorrect 9

CONCLUSION 13

APPENDIX

Appendix A
Court of Appeals Opinion, 4/10/02 . . . . . 1a

Appendix B
District Court Decision and Entry, 9/15/00 . . . 16a

Appendix C
Court of Appeals Order on Petition for
Rehearing *en banc* 48a

Appendix D
Excerpts From Deposition of Glenn Phelps . . . 50a

TABLE OF CITED AUTHORITIES

Cases:

Bell v. Wolfish,
441 U.S. 520 (1979). 9, 10

Brower v. County of Inyo,
489 U.S. 593 (1989) 10

Cottrell v. Caldwell,
85 F. 3d 1480 (11th Cir. 1996) 5, 6

County of Sacramento v. Lewis,
523 U.S. 833 (1998) 6, 7

Darrah v. City of Oak Park,
255 F. 3d 301 (6th Cir. 2001) 8

Fontana v. Haskin,
262 F. 3d 871 (9th Cir. 2001) 4

Frohmader v. Wayne,
958 F. 2d 1024 (10th Cir. 1992) 4

Gantt v. Akron Corrections Facility,
73 F. 3d 361 (6th Cir. 1996) 7, 9, 10

Gerstein v. Pugh,
420 U.S. 103 (1975) 10

Graham v. Connor,
490 U.S. 386 (1989) 5, 6, 10

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 7

Malley v. Briggs,
475 U.S. 335 (1986) 8

McDowell v. Rogers,
863 F. 2d 1302 (6th Cir. 1988) 9

Mitchell v. Forsyth,
472 U.S. 511 (1985) 6

Powell v. Gardner,
891 F. 2d 1039 (2nd Cir. 1989) 4

Riley v. Dorton,
115 F. 3d 1159 (4th Cir. 1997) 4, 6, 11, 12

Saucier v. Katz,
533 U.S. 194 (2001). 7, 8, 10

United States v. Johnstone,
107 F. 3d 200 (3rd Cir. 1997) 4

Wilkins v. May,
872 F. 2d 190 (7th Cir. 1989) 5, 11

Wilson v. Spain,
209 F. 3d 713 (8th Cir. 2000) 4

Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit opinion (App. A at 1a) is reported at 286 F.3d 295 (6th Cir. 2002), 2002 FED App. 0121 P. (6th Cir.). The District Court opinion (App. B at 16a) is reported at 164 F. Supp. 2d 961 (S.D. Oh. 2000).

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on April 10, 2002. The Court of Appeals entered an Order denying a timely petition for re-hearing *en banc* on June 5, 2002. (App. C at 48a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following provisions of the United States Constitution:

A. Fourth Amendment, United States Constitution.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

place to be searched, and the persons or things to be seized.

B. Fourteenth Amendment, United States Constitution.

Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent, Glenn W. Phelps, Jr., ("Phelps")filed an action against Petitioner, Robert M. Coy, Jr., ("Coy") a police officer with the City of Xenia, Ohio, and others alleging federal civil rights violations and state law claims arising from an incident which occurred on August 30, 1997 while Phelps was a pre-trial detainee at the City of Xenia jail. Federal jurisdiction was based on Phelps' claims under 42 U.S.C. §1983. The district court denied Coy's motion for summary judgment based upon qualified immunity. The Sixth Circuit Court of Appeals affirmed the decision of the district court and ruled the district court correctly determined Phelps' excessive force claim was governed by the Fourth Amendment objective reasonableness standard rather than the more stringent Fourteenth Amendment standard.

Robert Coy and Christin Stutes, both Xenia police officers, arrested Glenn Phelps for violating a municipal open container ordinance.[1] They put Phelps in handcuffs and took him to the police station for booking. While Phelps was being booked, Stutes asked him to take off his shoes and socks so Stutes could see if he had anything hidden about his feet. Stutes asked Phelps to lift his feet, but as Phelps tried to comply one of his feet got close to Stutes' face. Stutes grabbed the foot and pushed it away. Coy saw the incident and interpreted it as an attempt to kick Stutes. Coy tackled Phelps, and they both fell to the floor with Coy on top of the handcuffed Phelps. Phelps claims Coy told him not to try to kick one of his officers and hit Phelps in the face twice. According to Phelps, Coy then grabbed Phelps' shirt and banged his head into the floor at least three times. Coy then told Phelps to calm down and he helped him to his feet. Phelps acknowledged the only injuries he received were a split lip and bruises as a result of the physical confrontation with Coy.

Following the adverse opinion of the Sixth Circuit Court of Appeals on April 10, 2002 affirming the district court's denial of summary judgment, Coy timely petitioned for re-hearing *en banc* which was denied on June 5, 2002.

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[1] The facts set forth in this paragraph are taken from the Sixth Circuit opinion, 286 F. 3d at 297 (App. A at 1a), except for the last sentence which is taken from Phelps' deposition. (App. D at 50a).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Authoritative Decisions of Other Circuits That Have Addressed The Same Issue.

The alleged unnecessary force which Phelps complained violated his rights did not occur until he had been taken to the police station for processing following his arrest. The Sixth Circuit applied the Fourth Amendment prohibition against unreasonable seizures as the source of the right to determine the validity of Phelps' claim on the basis of the continuing seizure theory. The continuing seizure theory extends the application of the Fourth Amendment as long as the arresting officer remains involved, including that point after the arrest where the individual is in custody at the police station. The Sixth Circuit applied the Fourth Amendment objective reasonableness standard to determine the validity of the excessive force claim brought by Phelps.

Courts of appeals in addition to the Sixth Circuit have adopted the continuing seizure approach and applied the Fourth Amendment objective reasonableness standard to excessive force claims of pretrial detainees. *Wilson v. Spain*, 209 F. 3d 713 (8th Cir. 2000); *United States v. Johnstone,* 107 F. 3d 200 (3rd Cir. 1997); *Frohmader v. Wayne*, 958 F. 2d 1024 (10th Cir. 1992); *Powell v. Gardner,* 891 F. 2d 1039 (2nd Cir. 1989); and *Fontana v. Haskin*, 262 F. 3d 871 (9th Cir. 2001).

The Sixth Circuit decision is contrary to the authoritative decisions of the courts of appeals of the Fourth Circuit, the Seventh Circuit, and the Eleventh Circuit which have ruled on the same issue. In *Riley v. Dorton,* 115 F. 3d 1159 (4th Cir. 1997), the court declined to apply the Fourth

Amendment based on the continuing seizure theory where the arrestee was still in the hands of the same arresting officer at the time the alleged excessive force took place at the police station two hours and 90 miles from the time and place of arrest. In *Wilkins v. May,* 872 F. 2d 190 (7th Cir. 1989), the court declined to apply the Fourth Amendment on the continuing seizure theory where the alleged excessive force took place after plaintiff had been taken to a local police station and placed in an interrogation room. In both cases the courts applied the much more stringent Fourteenth Amendment due process standard to the analysis of whether excessive force was used. In *Cottrell v. Caldwell,* 85 F. 3d 1480 (11th Cir. 1996), the court also applied a Fourteenth Amendment due process analysis to a claim involving the alleged mistreatment of a pretrial detainee who died from asphyxiation in the police vehicle as a result of the position in which he was placed after he had been arrested and taken into custody by the arresting officer. The court's analysis in *Cottrell* was that the Fourteenth Amendment due process protection applied to claims of mistreatment while in custody whereas the Fourth Amendment was limited to claims of excessive force in connection with the actual arrest.

In *Graham v. Connor*, 490 U.S. 386 (1989), this Court said consideration of an excessive force claim first requires the identification of the specific constitutional right alleged to have been violated. The validity of the claim is judged by reference to the specific constitutional standard which governs that right, rather than by a generalized excessive force standard. In the Second, Third, Sixth, Eighth and Ninth Circuits, a claim of excessive force is based upon the Fourth Amendment standard of objective reasonableness even when the incident occurs after the arrest has been effected and the arrestee is in custody at the police station. The Fourth, Seventh, and Eleventh Circuits apply the

Fourteenth Amendment due process standard for determining whether excessive force has been used after the arrest has been effected and the arrestee is in custody. A much higher showing is required for a due process violation. That standard has been described as excessive force amounting to a deliberate indifference to a substantial risk of serious harm sufficiently serious to deny a minimal civilized measure of life's necessities. *Cottrell,* 85 F. 3d at 1491. It has been described as excessive force amounting to punishment. *Riley,* 115 F. 3d at 1167. And it also has been described as excessive force shocking to the conscience. *County of Sacramento v. Lewis,* 523 U.S. 833, 846 (1998).

There is a clear split of authority between those circuits which hold the Fourth Amendment is the source of the right of an excessive force claim of a pretrial detainee and those circuits which hold the Fourteenth Amendment is the source of such right. Unless the split of authority among the circuits is resolved, claims against law enforcement officials in similar circumstances will be decided differently where the material facts are not distinguishable.

II. The Question Presented is Important.

The determination of whether the rights of a pretrial detainee are rooted in the Fourth or Fourteenth Amendment is critical in the context of a qualified immunity defense. A qualified immunity defense is an assertion of an entitlement not to stand trial, not merely a defense to liability. *Mitchell v. Forsyth,* 472 U.S. 511 (1985). The initial inquiry of the court when an immunity defense is asserted is whether a constitutional right would have been violated on the facts alleged. This requires the identification of the specific constitutional right alleged to have been violated. *Graham v. Connor,* 490 U.S. 386 (1989). If the court's determination

is that the applicable right has not been violated, there is no need for further inquiry since immunity would apply. If the applicable constitutional right is held to have been violated, the second step in the court's analysis is whether that right was "clearly established". *Saucier v. Katz,* 533 U.S. 194 (2001).

Qualified immunity for law enforcement officials is the norm. *Harlow v. Fitzgerald,* 457 U.S. 800, 807 (1982). In order to overcome the presumption of immunity, the right must have been sufficiently clear that a reasonable official would have understood what he was doing violated that right in the situation he confronted. *Saucier*, 533 U.S. at 202. Where the applicable right is the Fourth Amendment, the issue is whether the conduct violated the objective reasonableness standard. Where the Fourteenth Amendment due process standard applies, a much higher standard is applied and only the most egregious conduct is a violation.

It is important that the Court determine whether excessive force claims of pretrial detainees are based upon the Fourth Amendment or the Fourteenth Amendment in order that a consistent standard is applied to determine whether the initial element of a constitutional violation occurred. Additionally, in the context of a qualified immunity defense, the conflict among the circuits compounds the uncertainty since a second determination must be made as to whether the force used violated clearly established law which would deprive the defendant of immunity. *Saucier*, 533 U.S. at 207. In *Saucier v. Katz*, this Court said "if the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." 533 U.S. at 202. Since the Sixth Circuit in *Gantt v. Akron Corrections Facility*, 73 F. 3d 361, 362 (6th Cir. 1996) acknowledged that the standard for determining

excessive force claims lies in a "murky area" between the Fourth and Fourteenth Amendments, unless this murky area is cleared up, it cannot be expected that a law enforcement officer could be on notice as to whether specific conduct would be "clearly unlawful" as required by *Saucier v. Katz*. The Court in *Saucier* favorably cited *Malley v. Briggs*, 475 U.S. 335, 341 (1986) in which the Court stated that qualified immunity protects "all but the plainly incompetent or those that knowingly violate the law." It is critical that the correct constitutional source of the applicable law be applied in order to make a determination of whether a reasonable officer would consider it clearly established and prohibitive of his actions.

Although the specific language used by the courts to describe the standard for determining whether the use of force violates the Fourteenth Amendment due process standard varies, it is clear that it places a higher standard for proving a violation than the Fourth Amendment objective reasonableness standard. *Darrah v. City of Oak Park,* 255 F. 3d 301, 306 (6th Cir. 2001). Since the injuries to Phelps herein were relatively minimal, there is a substantial likelihood that an analysis of whether Coy used excessive force based on the Fourteenth Amendment standard would have yielded a different result on Phelp's motion for summary judgment.

The importance of eliminating this conflict in the circuits as to the applicable standard is twofold: First, to reduce the instances in which claims of excessive force based on indistinguishable conduct yield different results; second, to enable police officers to more readily determine the "clearly established" law by which they are bound and by reference to which the court will ultimately determine whether qualified immunity applies. The question presented herein is important

for this Court to determine in order to eliminate the disparate results arising from the conflict which now exists in the circuits.

III. The Decision of the Sixth Circuit is Incorrect.

The Sixth Circuit cites *McDowell v. Rogers,* 863 F. 2d 1302, 1306 (6th Cir. 1988) as precedent. *McDowell* did not involve a claim of excessive force arising while a pretrial detainee was in custody. Rather, it involved use of force in effecting an arrest. *McDowell* did not involve the application of the continuing seizure theory which the Sixth Circuit relied upon herein to extend the Fourth Amendment scope beyond the point of arrest.

The Sixth Circuit failed to apply its own reasoning set forth in *Gantt v. Akron Corrections Facility,* 73 F. 3d 361, 362 (6th Cir. 1996) which identified the Fourth Amendment as appropriate for evaluating an excessive force claim which "arises in the context of an arrest or investigatory stop of a free citizen." *Gantt* based such analysis upon the language of the Fourth Amendment which guarantees citizens their rights to be secure in their persons against unreasonable seizures. *Gantt* expressly declined to address the issue of whether the Fourth Amendment continued to provide individuals protection against excessive force beyond the point at which the arrest ends and pretrial detention begins. But the court recognized that the "Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment," based upon this Court's decision in *Bell v. Wolfish,* 441 U.S. 520 (1979). *Gantt,* 73 F. 3d at 362. In *Gantt* the court recognized that "the standard under which a pretrial detainee's claim of excessive force is evaluated lies in the murky area between the Fourth and Eighth Amendments." *Gantt,* 73 F. 3d at 362. The Sixth Circuit herein attempted to

distinguish *Gantt* on the basis that the "murky area" does not begin until the protection of the Fourth Amendment ends which, based on its continuing seizure theory, is when the arresting officer relinquishes control. That fine line relied upon by the Sixth Circuit is not sufficient, under this Court's analysis in *Saucier v. Katz,* to "put the officer on notice that his conduct would be clearly unlawful." Therefore, under *Saucier*, Coy would have been entitled to summary judgment on the basis of qualified immunity.

The Sixth Circuit failed to place the proper emphasis on the precise language of the Fourth Amendment in its extension of the prohibition against unreasonable seizures to a pretrial detainee in custody. The decisions of this Court have emphasized the limits of Fourth Amendment protection. A Fourth Amendment seizure occurs "only when there is a governmentally caused termination of an individual's freedom of movement." *Brower v. County of Inyo,* 489 U.S. 593, 596-97 (1989). The Fourth Amendment is the constitutional provision to use when evaluating questions of probable cause for arrest and detention. *Gerstein v. Pugh,* 420 U.S. 103 (1975). In *Bell v. Wolfish,* the Court distinguished the initial decision for arrest and detention, which involves the initial deprivation of liberty of a citizen, from the permissible conditions of pretrial detention. Where the conditions of pretrial detention are at issue, the proper standard is the right to be free from punishment under the due process clause of the Fourteenth Amendment. *Bell v. Wolfish,* 441 U.S. at 533- 534. In *Graham v. Connor,* 490 U.S. 386 (1989), this Court noted that because the Fourth Amendment provided an explicit textual source of constitutional protection against a physically intrusive investigative stop, the Fourth Amendment rather than substantive due process applied. The Court further noted, contrary to the Sixth Circuit's continuing seizure theory, a

seizure triggering the Fourth Amendment's protections occurs only when the government officials have by means of physical force restrained the liberty of a citizen. 490 U.S. at 395 Fn. 10.

In *Riley v. Dorton,* 115 F. 3d 1159 (4th Cir. 1997), the court declined to apply the Fourth Amendment analysis because the events of which the pretrial detainee complained took place several hours and many miles from the time and place of his arrest. The court expressly rejected the continuing seizure theory, which it called the "arresting officer rule," for lack of textual or precedential support. The court said: ". . .This rule would have Fourth Amendment coverage depend upon the fortuity of how long an arresting officer happens to remain with a suspect. If the arresting officer quickly transferred custody of the arrestee to a backup officer, he could bring Fourth Amendment protection to an abrupt end." *Riley*, 115 F. 3d at 1164.

The conclusion of the Fourth Circuit in *Riley v. Dorton* that the continuing seizure theory applying the Fourth Amendment to post arrest encounters of a pretrial detainee is not supported by the language of the Fourth Amendment is consistent with prior decisions of this Court and is the better view. In *Wilkins v. May,* 872 F. 2d 190 (7th Cir. 1989), the court also rejected the concept of the continuing seizure doctrine on the basis of a plain language analysis. The language of the Fourth Amendment dictates that the key element to its application is an arrest in which the police are taking away a person's liberty. Where a suspect is already in custody and is being booked, he has already been seized and Fourth Amendment protections as to whether excessive force was used to effectuate the seizure are not applicable.

The Sixth Circuit reached the incorrect decision because it focused on issues related to the appropriate amount of force to effectuate an arrest under the objective reasonableness standard of the Fourth Amendment, and did not address the issue of whether the detainee was subjected to excessive force as would shock the conscience in violation of the Fourteenth Amendment. If the Sixth Circuit had applied the Fourteenth Amendment standard, it would have reached the correct result that Coy had not used such excessive force as shocked the conscience.

The Sixth Circuit's use of the Fourth Amendment also resulted in the failure of the court to address the nature and extent of the injuries to Phelps. In *Riley v. Dorton,* the court held that there could be no violation of due process of law on the basis of the use of excessive force where there was no showing of anything more than *de minimis* injuries. There is nothing in the facts relied upon by the Sixth Circuit herein which would indicate that Phelps suffered anything more than *de minimis* injuries. Since the Sixth Circuit decided to apply the Fourth Amendment objective reasonableness standard, however, it did not address that issue. If the Fourteenth Amendment due process analysis had been applied, it would have been necessary for the Sixth Circuit to address that issue, which likely would have achieved a different result.

The failure of the Sixth Circuit to address the issue of whether the injuries to Phelps were more than *de minimis* as a result of applying a Fourth Amendment analysis further demonstrates the need for this Court to resolve the conflict among the circuits in order that federal courts consistently address all of the appropriate legal issues in determining whether a qualified immunity defense is viable.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 00-4257

[Filed April 10, 2002]

GLENN W. PHELPS, JR., *Plaintiff-Appellee*,

v.

ROBERT M. COY, JR., *Defendant-Appellant*,

CHRISTIN STUTES, et al., *Defendants*.

Appeal from the United States District Court
for the Southern District of Ohio at Dayton
No. 98-00369
Walter H. Rice, Chief District Judge

JUDGES:
Before: SILER, CLAY, and GIBSON, Circuit Judges.*

* The Honorable John R. Gibson, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by

OPINION

JOHN R. GIBSON, Circuit Judge. In this case, a civil rights defendant takes an interlocutory appeal from the district court's denial of his motion requesting summary judgment on the ground of qualified immunity. Glenn Phelps sued Robert M. Coy, Jr., a sergeant in the Xenia, Ohio police department, alleging that Coy used unnecessary force while booking Phelps for a misdemeanor, specifically that Coy threw Phelps to the ground and banged his head against the floor of the police station. Coy moved for summary judgment, contending that he was entitled to qualified immunity because there was no evidence that his actions were unreasonable, nor that he acted maliciously, for the purpose of causing harm. The district court held that the facts taken in the light most favorable to Phelps indicated that Coy used unnecessary force, in violation of Phelps's clearly established Fourth Amendment rights, and accordingly it denied Coy's qualified immunity motion. Coy argues that the district court applied the wrong constitutional standard, that the law governing excessive force during booking was not clearly established, and that Coy's actions were not unreasonable. We affirm.

We state the facts as the district court recited them. *See Johnson v. Jones*, 515 U.S. 304, 319, 132 L. Ed. 2d 238, 115 S. Ct. 2151 (1995) ("When faced with an argument that the district court mistakenly identified clearly established law, the court of appeals can simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason."). The litigation arises out of the events of August 30, 1997. Coy and Christin

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designation.

Stutes, another Xenia police officer, arrested Phelps for violating a municipal open container ordinance. They put Phelps in handcuffs and took him to the police station for booking. While Stutes was booking Phelps, who was still handcuffed, he asked him to take off his shoes and socks, so Stutes could see if he had anything hidden about his feet. Stutes asked Phelps to lift his feet, but as Phelps tried to comply, one of his feet got close to Stutes's face. Stutes grabbed the foot and pushed it away, but Coy saw the incident and interpreted it as an attempt to kick Stutes. Coy tackled Phelps, and they both fell to the floor, with Coy on top of the handcuffed Phelps. Coy told Phelps not to try to kick one of his officers, and he hit Phelps in the face twice. Then he grabbed Phelps's shirt and banged his head into the floor at least three times. There was no evidence that Phelps posed a threat to Coy or anyone else after Coy was on top of him. Coy then told Phelps to calm down and he helped him to his feet.

Phelps filed suit against Coy, Stutes, the City of Xenia, Eric Prindle (the police chief of Xenia), and the City Commissioners of Xenia, alleging violation of 42 U.S.C. § 1983 (Supp. IV 1998), in addition to various state law claims. The defendants moved for summary judgment. The court granted summary judgment to the City of Xenia and its Commissioners, holding that Phelps failed to raise an issue of fact as to whether Coy's alleged use of excessive force resulted from a custom or policy of Xenia. The City of Xenia and the Commissioners were also entitled to judgment on the state law claims, because of state governmental immunity. As for Prindle, who was a police lieutenant, not chief of police, at the time of the incident, there was no evidence that he encouraged or otherwise participated in the alleged use of

excessive force, and so the court entered judgment for him. The court granted Stutes summary judgment on the section 1983 claim because there was no evidence that Stutes had the opportunity to prevent Coy from hurting Phelps.

Coy sought summary judgment on the ground of qualified immunity, arguing that Phelps's excessive force claim had to be evaluated under the objective reasonableness standard of the Fourth Amendment, and that under this standard, Coy had not violated Phelps's constitutional rights. Phelps responded that the claim was governed either by the Fourth or Fourteenth Amendments. Later, in his reply memorandum, Coy argued that the Eighth Amendment should govern Phelps's claim, so that Coy could be liable only if he used force "maliciously and sadistically for the very purpose of causing harm."

The district court held that Phelps's excessive force claim was governed by the Fourth Amendment standard and that under that standard there was an issue of fact as to whether Coy used unreasonable force. The facts, taken in the light most favorable to Phelps, showed that Coy saw Phelps's foot approach Stutes's face, and he concluded that Phelps was trying to kick Stutes. Coy tackled the handcuffed Phelps. As the two fell to the ground, with Coy on top of Phelps, Coy told Phelps he wouldn't be permitted to kick "one of his officers," and Coy hit Phelps in the face twice. Then, "while holding [Phelps's] shirt collar, Coy proceeded to slam his head into the floor at least three times." The district court concluded that a jury could find that the beating was not necessary to gain control of Phelps: "Coy was on top of [Phelps], who was handcuffed when the incident occurred. There is no evidence that, while in that position, [Phelps]

presented a threat to Coy or to any other officer." The court also held that Phelps's right to be free from use of excessive force was clearly established at the time of the events in question. The district court denied Coy's motion for summary judgment.

Coy filed this interlocutory appeal. Phelps moved to dismiss the appeal for lack of jurisdiction and also asked this court for sanctions. We took Phelps's motion with the case.

I.

To begin with, we must address Phelps's motion to dismiss this appeal for lack of jurisdiction. The relevant statute, *28 U.S.C. § 1291* (1994), grants appellate jurisdiction over final judgments only, and denial of summary judgment is usually considered an interlocutory order, not a final judgment. *Johnson v. Jones,* 515 U.S. 304, 309, 132 L. Ed. 2d 238, 115 S. Ct. 2151 (1995). However, denial of a motion for summary judgment on the ground of qualified immunity may be deemed a final, appealable order by the following reasoning: the qualified immunity doctrine exists partly to protect officials from having to stand trial; a defendant wrongly forced to go to trial loses the benefit of the immunity even if he or she is exonerated after trial; therefore, the order cannot effectively be reviewed after trial and is considered final. *Id.* at 311-12. Accordingly, denial of summary judgment can be appealed immediately, but only if the appeal presents a "neat abstract [issue] of law" rather than the question of whether the record demonstrates a genuine issue of fact for trial. *Berryman v. Rieger,* 150 F.3d 561, 563 (6th Cir. 1998) (quoting Jones, 515 U.S. at 317, 319-20). "If . . . the defendant disputes the plaintiff's version of the story,

the defendant must nonetheless be willing to concede the most favorable view of the facts to the plaintiff for purposes of the appeal," *id.*; otherwise, we cannot entertain the defendant's arguments, no matter how meritorious they may be.

In this case, Coy clearly has failed to limit his argument to questions of law taking the facts in the light most favorable to Phelps. Coy argues, for instance, that he "did not attempt to injure Phelps and intended to use no more force than was necessary to restrain and control him." If these assertions were crucial to Coy's appeal, we would be obliged to dismiss it for lack of jurisdiction. Where, however, the legal issues are discrete from the factual disputes, we may exercise our jurisdiction to resolve the legal issues only. *Claybrook v. Birchwell,* 274 F.3d 1098, 1103 (6th Cir. 2001). In this case, even taking the facts in the light most favorable to Phelps, Coy does present a series of strictly legal questions: Were Phelps's rights at the time of the alleged use of excessive force governed by the Fourth Amendment, the Eighth Amendment, or the Fourteenth Amendment? And, whatever our answer to that question, was that answer so clearly established at the time of the events in question that a reasonable officer would have known what standard governed his conduct and that the conduct was wrong under that standard? We conclude that these are the kind of questions that may be raised by interlocutory appeal and that we have jurisdiction over this appeal. We deny Phelps's motion to dismiss and for imposition of sanctions.

II.

A claim of qualified immunity presents two closely linked questions: whether the defendant violated the plaintiff's

rights and whether those rights were clearly established at the time of the alleged violation. *Saucier v. Katz,* 533 U.S. 194, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* Because in this procedural posture we must take the facts in the light most favorable to the plaintiff, these questions are strictly legal and we review them de novo. *Dickerson v. McClellan,* 101 F.3d 1151, 1157 (6th Cir. 1996).

To decide whether Phelps presented evidence that Coy violated his constitutional right not to be subjected to unnecessary beating, we must first ascertain the source of that right. *See Graham v. Connor,* 490 U.S. 386, 394, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989) ("In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force."). Between them, Phelps and Coy have proposed three possible sources: the Fourth Amendment, the due process clause of the Fourteenth Amendment, and the Eighth Amendment. The question of which amendment supplies Phelps's rights is not merely academic, for the standards of liability vary significantly according to which amendment applies. *See Darrah v. City of Oak Park,* 255 F.3d 301, 306 (6th Cir. 2001) ("A substantially higher hurdle must be surpassed to make a showing of excessive force under the Fourteenth Amendment than under the 'objective reasonableness' test of [the Fourth Amendment]. . ."). Which amendment applies depends on the status of the plaintiff at the time of the incident, whether free citizen, convicted prisoner, or

something in between. *See Gravely v. Madden*, 142 F.3d 345, 348-49 (6th Cir. 1998).

If the plaintiff was a free person at the time of the incident and the use of force occurred in the course of an arrest or other seizure of the plaintiff, the plaintiff's claim arises under the Fourth Amendment and its reasonableness standard. *Graham,* 490 U.S. at 395. That standard requires that the officer's use of force be objectively reasonable, balancing the cost to the individual against the government's interests in effecting the seizure. *Id.* at 396. This standard contains a built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case. *Id.*; *Saucier,* 121 S. Ct. at 2158. The officer's subjective intentions are irrelevant to the Fourth Amendment inquiry. *Graham,* 490 U.S. at 397.

For a plaintiff who was a convicted prisoner at the time of the incident, the Eighth Amendment sets the standard for an excessive force claim. *Id.* at 395 n.10; *Cornwell v. Dahlberg,* 963 F.2d 912, 915-16 (6th Cir. 1992). In contrast to the reasonableness standard of the Fourth Amendment, the Eighth Amendment standard focuses on the official's "obduracy and wantonness," *Whitley v. Albers,* 475 U.S. 312, 319, 89 L. Ed. 2d 251, 106 S. Ct. 1078 (1986), asking "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id.* at 320-21 (quoting *Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir. 1973)).

Finally, if a plaintiff is not in a situation where his rights are governed by the particular provisions of the Fourth

or Eighth Amendments, the more generally applicable due process clause of the Fourteenth Amendment still provides the individual some protection against physical abuse by officials. *Darrah,* 255 F.3d at 305-06. In particular, "it is clear . . . that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham,* 490 U.S. at 395 n.10.

The district court correctly determined that the alleged beating occurred during the course of the arrest of a free person, and therefore the parties' rights and liabilities are governed by the Fourth Amendment's reasonableness standard. Coy contends that the Fourth Amendment does not apply to Phelps's case because Phelps had already been arrested when the incident took place. Our cases refute the idea that the protection of the Fourth Amendment disappears so suddenly. At the time of the incident, Phelps was still in the custody of Coy and Stutes, the arresting officers. Stutes was booking Phelps when he asked Phelps to raise his foot, and this was the gesture which Coy mistook for aggression. After the incident, Phelps was booked and released, rather than being incarcerated as a pretrial detainee. We have explicitly held that the Fourth Amendment reasonableness standard governs throughout the seizure of a person: "The seizure that occurs when a person is arrested continues throughout the time the person remains in the custody of the arresting officers." *McDowell v. Rogers,* 863 F.2d 1302, 1306 (6th Cir. 1988). In *Cox v. Treadway,* 75 F.3d 230, 241 (6th Cir. 1996), Judge Ryan, writing for the court, stated that the constitutional analysis does not instantly change the moment a suspect is subdued by the police and that "creating a different Fourth Amendment standard applicable to the use of force in a post-arrest situation than is applicable to pre-

arrest conduct [would introduce] a distinction in meaning of the Fourth Amendment that is found nowhere in its language." While the continuing seizure rule is not universally accepted in other circuits, *see Fontana v. Haskin,* 262 F.3d 871, 879-80 & n.5 (9th Cir. 2001) (detailing circuit split on this issue), it is the law in this circuit and has been since *McDowell.*

Coy argues that Phelps should be classified as a pretrial detainee and that "the standard under which a pretrial detainee's claim of excessive force is evaluated lies in the murky area between the Fourth and Eighth Amendments," quoting *Gantt v. Akron Corr. Facility,* 1996 U.S. App. LEXIS 1417, No. 95-3147, 1996 WL 6530 (6th Cir. Jan. 8, 1996) (unpublished). Whatever arguments can be made about pretrial detainees' rights are beside the point in this case, in which the plaintiff was still in the custody of the arresting officers and was never incarcerated. The "murky area" does not begin until the protection of the Fourth Amendment ends, and our precedent establishes that an arrestee in the custody of the arresting officers is still sheltered by the Fourth Amendment.

Coy argued below that the Eighth Amendment governed Phelps's claim. The Eighth Amendment applies to convicted prisoners and so would not apply to Phelps, who was in the process of being booked by arresting officers (for a misdemeanor on which he never was convicted). *Graham,* 490 U.S. at 392 n.6. Coy contends that we should follow *Valencia v. Wiggins,* 981 F.2d 1440 (5th Cir. 1993), in which the Fifth Circuit applied the Eighth Amendment standard to the case of a pretrial detainee involved in a prison disturbance. The Fifth Circuit held that, even though the

rights of a pretrial detainee are governed by the Fourteenth Amendment's due process clause, *id.* at 1445, there is no reason to treat pretrial detainees differently from convicts in the context of prison or jail disturbances. *Id.* at 1445-46. In debating which standard to apply, the Fifth Circuit explicitly distinguished between incarcerated pretrial detainees and arrestees still in the custody of the arresting officers:

> We do not believe that the Fourth Amendment provides an appropriate constitutional basis for protecting against deliberate official uses of force occurring, as in this case, *after* the incidents of arrest are completed, *after* the plaintiff has been released from the arresting officer's custody, and *after* the plaintiff has been in detention awaiting trial for a significant period of time. Our reasons for so deciding are threefold. First, we believe that the Fourth Amendment itself provides weak textual support for such an extension. As the Fourth Amendment protects against unreasonable "seizures," it seems primarily directed to the *initial* act of restraining an individual's liberty, such as an investigatory stop or arrest. (*Graham* itself offers no explicit suggestion as to when a Fourth Amendment seizure comes to an end, although its facts indicate that a seizure under the Fourth Amendment does not end the moment the police gain custody and control over a suspect.)

Id. at 1443-44 (emphasis in original and footnotes omitted). From this passage we can see that the *Valencia* court itself would not have considered its reasoning germane to the case of an arrestee in custody of the officers who arrested him. *Valencia* is altogether irrelevant in this case, which does not involve a jail disturbance and which does involve an arrest in progress. Moreover, in *Gantt*, the case of a pretrial detainee who had been incarcerated because he could not post bond, we rejected an invitation to apply the Eighth Amendment in reliance on *Valencia* because "Gantt was by no stretch of the imagination guilty of causing a prison disturbance." 1996 U.S. App. LEXIS 1417, 1996 WL 6530, at. After we have declined to apply the Eighth Amendment standard in the case of an incarcerated pretrial detainee, it should be obvious that we would not apply it in this case.

Applying the Fourth Amendment analysis, there is no doubt that the facts, taken in the light most favorable to Phelps, establish a violation of Phelps's rights. In assessing the reasonableness of Coy's actions, we analyze the events in segments. *Dickerson v. McClellan,* 101 F.3d 1151, 1161-62 (6th Cir. 1996). The relevant segment of this story is what happened after Coy tackled the handcuffed Phelps and was sitting on top of him. The district court held that once Coy was on top of Phelps, there was no evidence that Phelps presented a threat to Coy or any other officer. Although we must always weigh the government's interest justifying the use of force against the individual's interest in avoiding that force, *Cox,* 75 F.3d at 241, and we must add in the measure of deference due an officer's on-the-spot decisions, *see Saucier,* 121 S. Ct. at 2158, on the facts as we must take them, there was simply no governmental interest in continuing to beat Phelps after he had been neutralized, nor could a

reasonable officer have thought there was. *See Adams v. Metiva,* 31 F.3d 375, 386 (6th Cir. 1994) (use of force after suspect incapacitated by mace would be excessive as a matter of law); *McDowell,* 863 F.2d at 1307 (blow with nightstick to handcuffed, unresisting suspect would be gratuitous and therefore unreasonable); *Darnell v. Caver, 1998 U.S. App. LEXIS 15390, No. 97-5297, 1998 WL 416000,* at (6th Cir. 1998) (unpublished) (after suspect thrown to ground, unreasonable for officer to lift suspect's head and let it drop to pavement). The facts recited by the district court would permit a finding that Coy inflicted on Phelps a beating that was not only unnecessary, but also would have been recognized as unnecessary by a reasonable officer in his position. These facts would establish a violation of Phelps's Fourth Amendment rights.

III.

Our inquiry does not end with the determination that the facts alleged would amount to a violation of Phelps's Fourth Amendment rights. *Saucier v. Katz,* 533 U.S. 194, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001). Coy may yet be entitled to summary judgment if Phelps's rights were not clearly established at the time of the incident, or more precisely, if in August 1997 it would not have been "clear to a reasonable officer [in Coy's position] that his conduct was unlawful in the situation he confronted." *Id.*

The legal precedent on which we rely in concluding that Phelps enjoyed the protection of the Fourth Amendment while in the custody of the arresting officers antedates the incident in this case by almost a decade. *See McDowell v. Rogers,* 863 F.2d 1302, 1306 (6th Cir. 1988). There is,

however, one of our cases which, while we conclude it did not affect the authority of *McDowell*, nevertheless merits discussion. In *Holmes v. City of Massillon,* 78 F.3d 1041 (6th Cir. 1996), Holmes brought a section 1983 suit against Fabianich, a police officer, for use of excessive force while she was being booked for a misdemeanor. The district court submitted the case to the jury under the Fourth Amendment standard, and the officer did not object to the instruction. He later contended that the jury should have been instructed under the Fourteenth Amendment, rather than the Fourth. We rejected the officer's argument under the plain error standard of review, stating:

> Since the law of this Circuit is unclear as to whether a pretrial detainee can bring a Fourth Amendment excessive force claim or even as to when an arrestee clearly becomes a pretrial detainee, we cannot hold that the trial court committed plain error in instructing the jury (in the 1991 trial) under the Fourth Amendment standard.

Id. at 1049 n.6. Although Holmes, like Phelps, was in the process of being booked for a misdemeanor at the time of the alleged use of excessive force, Holmes's case does not mean that the law concerning Phelps's rights was unclear in this circuit. *Holmes* recounts the following facts: "After Holmes was placed under arrest, she was turned over to Sergeant George Fabianich for booking." *Id.* at 1043. This recitation implies that Fabianich was not the arresting officer, and therefore Holmes's case did not fall within the rule we have relied on concerning arrestees in the custody of the arresting officer. We conclude that it was clearly established in 1997

that Phelps enjoyed the protection of the Fourth Amendment during the incident.

Similarly, the unreasonableness of the alleged facts under the Fourth Amendment was clearly established at the time of the events in this case. *See McDowell,* 863 F.2d at 1307; *Adams v. Metiva,* 31 F.3d 375, 387 (6th Cir. 1994) (unconstitutionality of use of gratuitous force against helpless and incapacitated suspect during arrest well established in 1991). No reasonable officer could have thought the alleged actions were lawful.

We affirm the district court's denial of summary judgment. We deny Phelps's motion to dismiss the appeal and for the award of sanctions.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION

Case No. C-3-98-369

Filed September 15, 2000

GLENN W. PHELPS, JR., *Plaintiff,*
v.
ROBERT M. COY, JR., et al., *Defendant.*

JUDGES:
WALTER HERBERT RICE, CHIEF JUDGE, UNITED STATES DISTRICT COURT.

OPINION

Decision and Entry Sustaining in Part and Overruling in Part Motion for Summary Judgment of Defendants Coy and Stutes (Doc. # 71); Decision and Entry Overruling, as Moot, Xenia Defendants' Motion to Compel Discovery (Doc. # 77); Decision and Entry Sustaining Xenia Defendants' Motion for Summary Judgment (Doc. # 78); Decision and Entry Sustaining in Part and Overruling, as Moot in Part, Xenia Defendants' Motion to Strike (Doc. # 84); Decision and Entry

Overruling Xenia Defendants' Motion to Strike Supplemental Affidavit (Doc. # 89)

This litigation arises out of incidents which occurred on August 30, 1997.[1] On that date, Defendants Robert M. Coy, Jr. ("Coy") and Christin Stutes ("Stutes"), who were then employed by the Police Department for the City of Xenia, Ohio ("Xenia"), as, respectively, a Sergeant and an Officer, arrested the Plaintiff for violating Xenia's open container ordinance.[2] After being arrested, the Plaintiff was placed in handcuffs and transported to the Xenia Police Station.

At that facility, Stutes processed the Plaintiff, asking him routine questions as part of the booking function. Plaintiff remained handcuffed throughout. Stutes asked the Plaintiff to remove his shoes and socks, in order for that officer to ascertain whether he had hidden drugs in his feet. Stutes also instructed the Plaintiff to lift his feet. As the handcuffed Plaintiff was complying with that directive, one of his feet got close to Stutes' face. Stutes was able to grab the offending foot and push it away. Coy, seeing the Plaintiff's action and interpreting it as an attempt to kick Stutes, tackled the Plaintiff, which caused them both to fall to the ground, with

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[1] Since this case is before the Court on the Defendants' motions requesting summary judgment, the Court sets forth the facts and circumstances giving rise to this litigation in the manner most favorable to the Plaintiff.

[2] Plaintiff was also charged with resisting arrest, as a result of events which occurred during his arrest. All charges against the Plaintiff were subsequently dismissed.

Coy on landing top of the Plaintiff. As he was on top of Plaintiff and, while telling him not to attempt to kick one of his officers, Coy struck the Plaintiff in the face twice and, then, grabbed his shirt and slammed his head into the ground at least three times. As the confrontation between Coy and Plaintiff was occurring, Tawfiq Jabbar ("Jabbar"), another person, who had been arrested and was in the Police Station, got out of his chair in which he was sitting and started to walk toward the altercation, causing Stutes to shift his attention to Jabbar. As a result, Stutes did not attempt to intervene to stop Coy's actions. By the time that Stutes' attention refocused upon the altercation between Coy and Plaintiff, Coy was telling the Plaintiff to calm down and proceeding to help him to his feet.

Danny O'Malley, who was then Chief of Police for Xenia, immediately launched an investigation into the events that had occurred on August 30th. The result of that investigation was that Coy was fired from his position with the Xenia Police Department the following month.[3] Shortly thereafter, Judge Susan Goldie of the Xenia Municipal Court hired Coy as a bailiff.

In his Complaint (Doc. # 1), the Plaintiff sets forth claims against Stutes, Coy, Xenia, Eric Prindle ("Prindle") and the City Commissioners of Xenia.[4] For sake of convenience, the Court, throughout this Decision, refers to

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[3] There is no evidence that Stutes was disciplined in any manner for the events which had occurred on August 30th.

[4] The Plaintiff has sued the City Commissioners solely in their official capacity.

Xenia, Prindle and the City Commissioners of Xenia collectively as the "Xenia Defendants." With his First Claim for Relief, the Plaintiff has set forth a claim under 42 U.S.C. § 1983, against all Defendants, alleging that his rights under the Fourth and Fourteenth Amendments were violated by the use of excessive force. With his Second Claim for Relief, the Plaintiff has set forth a state, common law claim of assault and battery against Coy and Xenia. With his Third Claim for Relief, Plaintiff sets forth an alternative theory for imposing liability on Xenia, under § 1983, for the actions of Coy, alleging that the municipality ratified those actions, given that Judge Goldie hired him shortly after he had been fired.[5] With his Fifth Claim for Relief, Plaintiff sets forth a state, common law claim of false arrest against Coy, Stutes and Xenia.[6] With his Eighth Claim for Relief, Plaintiff alleges that a provision in Ohio's Governmental Tort Immunity Act, Ohio Revised Code § 2744.02(B), is unconstitutional, because it arbitrarily

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[5] With his Fourth, Sixth and Seventh Claims for Relief. Plaintiff alleges, respectively, that Ohio Revised Code § 2323.54, 2315.18, 2315.21 and 2307.31 violate provisions in the Ohio Constitution. Those statutes were either enacted or amended as part of Ohio's short-lived Tort Reform Act, House Bill 350. In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward,* 86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999), the Ohio Supreme Court concluded that the Tort Reform Act violated the Ohio Constitution. As a result of that decision, this Court will not apply the versions of § 2323.54, 2315.18, 2315.21 and 2307.31, either added or amended by the Tort Reform Act. Therefore, the Plaintiff's Fourth, Sixth and Seventh Claims for Relief are moot.

[6] It bears emphasis that the Plaintiff has not set forth a claim under § 1983, alleging that he was arrested without probable cause in violation of the Fourth Amendment.

distinguishes between governmental and proprietary functions.[7]

This case is now before the Court on the following motions, to wit: the Motion for Summary Judgment of Coy and Stutes (Doc. # 71); the Xenia Defendants' Motion to Compel Discovery (Doc. # 77); the Xenia Defendants' Motion for Summary Judgment (Doc. # 78); the Xenia Defendants' Motion to Strike (Doc. # 84); and the Xenia Defendants' Motion to Strike Supplemental Affidavit (Doc. # 89). As a means of analysis, the Court will initially set forth the standards which are applicable to all motions for summary judgment, following which it rule upon the Xenia Defendants' Motion to Strike (Doc. # 84) and Motion to Strike Supplemental Affidavit (Doc. # 89). The Court will then will turn to the two motions seeking summary judgment, discussing them in the above order. If the Court overrules the Xenia Defendants' Motion for Summary Judgment (Doc. # 78), it will rule upon their Motion to Compel Discovery (Doc. # 77).[8] If, however, the Court concludes that the Xenia Defendants are entitled to summary judgment, it will overrule their Motion to Compel Discovery (Doc. # 77), as moot.

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[7] The Plaintiff does not specify which provision of what constitution (i.e., federal or state) is violated by that legislation.

[8] With that motion, the Xenia Defendants seek an order from the Court, requiring the Plaintiff to provide certain information relating to his use of controlled substances. That evidence has no bearing on the pending motions for summary judgment.

I. Standards Applicable to Motions for Summary Judgment

Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Of course, the moving party:

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Id. at 323. *See also Boretti v. Wiscomb,* 930 F.2d 1150, 1156 (6th Cir. 1991) (The moving party has the "burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record, construed favorably to the nonmoving party, do not raise a genuine issue of material fact for trial.") (quoting *Gutierrez v. Lynch,* 826 F.2d 1534, 1536 (6th Cir. 1987)). The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (quoting Fed. R. Civ. P. 56(e)). Thus, "once the moving party has met its initial burden, the nonmoving party must present evidence that creates a genuine issue of material fact making it necessary to

resolve the difference at trial." *Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241, 1245 (6th Cir. 1995). Read together, *Liberty Lobby* and *Celotex* stand for the proposition that a party may move for summary judgment by demonstrating that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict motion (now known as a motion for judgment as a matter of law. Fed.R.Civ.P. 50). *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989).

Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient to "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). *See also Michigan Protection and Advocacy Service, Inc. v. Babin,* 18 F.3d 337, 341 (6th Cir. 1994) ("The plaintiff must present more than a scintilla of evidence in support of his position; the evidence must be such that a jury could reasonably find for the plaintiff."). Rather, Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex Corp.*, 477 U.S. at 324. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Summary judgment shall be denied "if there are. . . 'genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.'" *Hancock v. Dodson,*

958 F.2d 1367, 1374 (6th Cir. 1992) (citation omitted). Of course, in determining whether a genuine issue of material fact exists, a court must assume as true the evidence of the nonmoving party and draw all reasonable inferences in the favor of that party. *Anderson,* 477 U.S. at 255 (emphasis added). If the parties present conflicting evidence, a court may not decide which evidence to believe, by determining which parties' affiants are more credible; rather, credibility determinations must be left to the fact-finder. 10A Wright, Miller & Kane, Federal Practice and Procedure, § 2726. In ruling on a motion for summary judgment (in other words, in determining whether there is a genuine issue of material fact), "[a] district court is not. . . obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *Interroyal Corp. v. Sponseller,* 889 F.2d 108, 111 (6th Cir. 1989), *cert. denied,* 494 U.S. 1091 (1990). *See also L.S. Heath & Son, Inc. v. AT&T Information Systems, Inc.,* 9 F.3d 561 (7th Cir. 1993); *Skotak v. Tenneco Resins, Inc.,* 953 F.2d 909, 915 n. 7 (5th Cir.), *cert. denied,* 506 U.S. 832, 121 L. Ed. 2d 59, 113 S. Ct. 98 (1992) ("Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment. . ."). Thus, a court is entitled to rely, in determining whether a genuine issue of material fact exists on a particular issue, only upon those portions of the verified pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits submitted, specifically called to its attention by the parties.

II. Xenia Defendants' Motion to Strike (Doc. # 84)

and Xenia Defendants' Motion to Strike Supplemental Affidavit (Doc. # 89)

With their Motion for Summary Judgment (Doc. # 78), the Xenia Defendants argue, *inter alia*, that, in accordance with *Monell v. New York City Dept. of Social Serv.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), and its progeny, liability cannot be imposed upon Xenia for any constitutional tort committed by employees of Xenia. To demonstrate that there is a genuine issue of material fact as to *Monell* liability, the Plaintiff has submitted an affidavit from his expert witness, R. Paul McCauley ("McCauley"). With their Motion to Strike (Doc. # 84), the Xenia Defendants request that the Court strike PP 2-10 of that affidavit.[9] The Xenia Defendants point out that McCauley

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[9] The Xenia Defendants have also requested that the Court strike Exhibit D to Plaintiff's Memorandum in Opposition to the Xenia Defendants' Motion for Summary Judgment (Doc. # 82). That Exhibit is an unauthenticated document, purportedly prepared by the Xenia Public Schools, which indicates that the Plaintiff is a slow learner. The Xenia Defendants argue that Exhibit D must be stricken, because it has not been authenticated and contains inadmissible hearsay. Plaintiff has not responded to the Xenia Defendants' request that the Court strike that Exhibit. Without addressing the question of whether the document constitutes inadmissible hearsay, the Court concludes that Exhibit D must be stricken, because it has not been authenticated. Rule 56(e) requires that sworn or certified copies of all papers be attached to an affidavit. Thus, to be considered in a summary judgment proceeding, an exhibit must be authenticated. 10A Wright, Miller & Kane, Federal Practice and Procedure § 2722. Since the Plaintiff has not authenticated the document, this Court cannot consider it when ruling upon the Xenia Defendants' Motion for Summary

failed to identify the evidentiary materials that he reviewed in order to form his opinions. Additionally, those Defendants argue that PP 2-10 of McCauley's affidavit must be stricken, because they contain nothing more than conclusory opinions, without setting forth the bases for those opinions. In response to the Xenia Defendants' Motion to Strike (Doc. # 84), the Plaintiff has submitted a supplemental affidavit from McCauley. *See* Doc. # 87. That supplemental affidavit adds a new P 2, in which McCauley identifies the materials that he reviewed in order to prepare that affidavit, and adds flesh to one of the paragraphs in his initial affidavit, which the Xenia Defendants have argued is too conclusory.[10] The submission

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Judgment (Doc. # 78). Accordingly, the Court sustains the Xenia Defendants' Motion to Strike (Doc. # 84), to the extent that, with that motion, they request that the Court strike Exhibit D to the Plaintiff's Memorandum in Opposition to the Xenia Defendants' Motion for Summary Judgment (Doc. # 82).

[10] In P 4 of his initial affidavit, McCauley indicated that it was vitally important that law enforcement agencies have ethical codes of conduct, indicating that it is not only permitted but also expected that an officer will intervene when another officer, regardless of rank, is violating the constitutional rights of a citizen. In addition, McCauley states that it is vital that officers be trained on that expected conduct and that they be disciplined for failing to follow that expectation. In concluding that paragraph, he states that the Xenia Police Department "failed to do these things." Paragraph 5 of McCauley's supplemental affidavit contains identical language to that in P 4 of his initial affidavit; however, P 5 also includes a newly added final sentence, wherein he states that the Xenia Police Department has a policy or custom of failing to supervise, to control and to train its officers to respond to the use of excessive force by a fellow officer, since Stutes failed to intervene to stop the

of McCauley's supplemental affidavit has caused the Xenia Defendants to file their Motion to Strike Supplemental Affidavit (Doc. # 89). Therein, the Xenia Defendants argue that the Court should disregard McCauley's supplemental affidavit, since it was not submitted in a timely fashion. Alternatively, those Defendants contend that the additions contained in McCauley's supplemental affidavit do not cure the defects in his initial such. The Plaintiff has not responded to the Xenia Defendants' Motion to Strike Supplemental Affidavit (Doc. # 89).

Given that McCauley's two affidavits are virtually identical, the only difference being that the supplemental version contains additional text, it is apparent that the Plaintiff intends the supplemental affidavit to supersede the first. Therefore, the Court will initially address the Xenia Defendants' argument that the supplemental affidavit must be stricken, because it was untimely. If the Court rejects that argument, it will focus exclusively upon the supplemental affidavit, when deciding whether the evidence raises a genuine issue of material fact. Under that circumstance, the Court will also overrule, as moot, the branch of the Xenia Defendants' Motion to Strike (Doc. # 84), with which they challenge McCauley's initial affidavit, and consider the arguments contained in that motion, when it rules upon the alternative argument in their Motion to Strike Supplemental Affidavit (Doc. # 89), i.e., that McCauley's second affidavit did not cure the deficiencies contained in his first.

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use of excessive force by Coy.

The Xenia Defendants point out that, although they filed their Motion for Summary Judgment (Doc. # 78) on November 30, 1999, the Court gave the Plaintiff an extension of time until January 13, 2000, in which to file a memorandum in opposition. That period of time, the Xenia Defendants submit, was adequate for Plaintiff to be able to file his evidence in opposition to their motion. Therefore, the Xenia Defendants argue that the Plaintiff should not be permitted to supplement McCauley's fatally deficient affidavit. Although the Xenia Defendants assert in most conclusory fashion that they have been prejudiced by the supplementation of McCauley's affidavit, this Court is unable to discern how that could have occurred. The Xenia Defendants have argued that the additions to McCauley's affidavit have not cured the deficiencies they pointed out in their Motion to Strike (Doc. # 84) and that the supplemental affidavit fails to raise a genuine issue of material fact. *See* Doc. # 88. In the absence of a showing that the Xenia Defendants have suffered unfair prejudice, as a result of the filing of McCauley's supplemental affidavit, this Court will not strike that document. Consequently, this Court overrules, as moot, the branch of the Xenia Defendants' Motion to Strike (Doc. # 84), with which they challenge PP 2-10 of McCauley's initial affidavit. However, as is indicated above, the Court will consider the arguments set forth in that motion, when deciding whether to strike the supplemental affidavit.

In *Monks v. General Electric Co.*, 919 F.2d 1189 (6th Cir. 1990), the Sixth Circuit addressed the propriety of striking an affidavit from an expert witness, which had been submitted to oppose a motion for summary judgment. Therein, the District Court struck the affidavit from the plaintiff's expert, since it failed to set forth the bases of the

opinions contained therein. Upon appeal, the Sixth Circuit concluded that the District Court had erred in striking the affidavit, but that its error was harmless, since the affidavit, when considered, did not raise a genuine issue of material fact. The Sixth Circuit stressed that the issue of whether a District Court should strike an affidavit is distinct from the question of whether the information contained in the affidavit, if not stricken, is sufficient to raise a genuine issue of material fact and, thus, to permit a party to withstand a summary judgment motion. *Id.* at 1192-93. *Accord, Ambrosini v. Labarraque,* 296 U.S. App. D.C. 183, 966 F.2d 1464, 1470 (D.C. Cir. 1992) (and cases cited therein). Thus, in *Monks,* the Sixth Circuit held that the District Court should have considered the expert's affidavit, despite his failure to set forth the bases for the opinions, and concluded that the information therein did not raise a genuine issue of material fact. In accordance with *Monks,* this Court will decline to strike McCauley's supplemental affidavit. Rather, the Court will consider the Xenia Defendants' challenges to that affidavit, when deciding whether it raises a genuine issue of material fact on the Plaintiff's *Monell* claim against Xenia.

Accordingly, the Court overrules the Xenia Defendants' Motion to Strike Supplemental Affidavit (Doc. # 89).

III. Motion for Summary Judgment of Defendants Coy and Stutes (Doc. # 71)

The Plaintiff's § 1983 claim against Coy is predicated upon the allegation that he used excessive force, in violation of the Fourth and/or Fourteenth Amendments, by tackling Plaintiff, striking him in the face twice and repeatedly

slamming his head against the floor at the Xenia Police Station. Plaintiff contends that liability can be imposed upon Stutes, because he did not intervene to prevent the constitutional violation by his fellow officer. With their Motion for Summary Judgment, Coy and Stutes argue that they are entitled to summary judgment on Plaintiff's § 1983 claim against them, on the basis of the doctrine of qualified immunity. Those Defendants have not moved for summary judgment on the Plaintiff's state law claims against them. As a means of analysis, the Court will initially review the standards which govern that doctrine, following which it will discuss the parties' arguments in support of and in opposition to the request for summary judgment by Coy and Stutes.

In *Estate of Dietrich v. Burrows,* 167 F.3d 1007 (6th Cir. 1999), the Sixth Circuit restated the principles that courts employ to determine whether a defendant is entitled to summary judgment on the basis of qualified immunity:

> As a general principle, "government officials performing discretionary functions enjoy qualified immunity from liability for performance of their official duties." [*Thomas v. Whalen,* 51 F.3d 1285, 1289 (6th Cir. 1995)]. Whether such an official may nevertheless be held personally liable for an allegedly unlawful action involves an inquiry into the "objective legal reasonableness" of the action. *See Harlow v. Fitzgerald,* 457 U.S. 800, 819, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). If the constitutional right "the government official allegedly violated was clearly established at the time of the

> challenged conduct, 'the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.'" *Thomas,* 51 F.3d at 1289 (quoting *Harlow*, 457 U.S. at 818-19).
>
> When determining whether a right is "clearly established," we look "first to decisions of the Supreme Court, then to decisions of this Court and other courts within our circuit, and finally to decisions of other circuits." *Daugherty v. Campbell,* 935 F.2d 780, 784 (6th Cir. 1991). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). As the Supreme Court explained, however, "this is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Id. (citations omitted).

Id at 1012. In *Pouillon v. City of Owosso,* 206 F.3d 711, 714 (6th Cir. 2000), the Sixth Circuit wrote that "'where ... the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability.' *Sova v. City of Mount Pleasant,* 142 F.3d 898, 903 (6th Cir. 1998)." *See also*, *Pray v. City of Sandusky,* 49 F.3d 1154, 1161 (6th Cir. 1995) (noting that

summary judgment on the basis of qualified immunity "is not appropriate if there are factual disputes involving an issue on which the question of immunity turns, 'such that it cannot be determined before trial whether the defendant did acts that violate clearly established rights.' *Poe v. Haydon,* 853 F.2d 418, 426 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007, 102 L. Ed. 2d 780, 109 S. Ct. 788 (1989)"); *Brandenburg v. Cureton,* 882 F.2d 211, 215-16 (6th Cir. 1989) (noting that many times "the jury becomes the final arbiter of [defendant's] claim of immunity, since the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury"). In *Kain v. Nesbitt,* 156 F.3d 669 (6th Cir. 1998), the Sixth Circuit explained the nature of a defendant's request for summary judgment on the basis of qualified immunity:

> When making a qualified immunity analysis, it is important to remember that the defendant is, in essence, saying: "If the plaintiff's version is credited, what I did, judged today, *arguendo* would be wrongful, but at the time I acted, no reasonable officer would have known he was acting wrongfully." *See Berryman v. Rieger,* 150 F.3d 561, 562 (6th Cir. 1998) ("the defendant must be prepared to overlook any factual dispute and to concede an interpretation of the facts in the light most favorable to the plaintiff's case").

Id at 671-72. A court evaluating a claim of qualified immunity "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly

established at the time of the alleged violation." *Wilson v. Layne,* 526 U.S. 603, 609, 143 L. Ed. 2d 818, 119 S. Ct. 1692 (1999). With that framework in mind, the Court turns to the question of whether either officer is entitled to summary judgment on the basis of qualified immunity, discussing Coy before turning to Stutes.

In accordance with *Wilson*, this Court must first decide whether the evidence raises a genuine issue of material fact concerning Plaintiff's claim that Coy's actions constituted a violation of his constitutional right to be free from excessive force. To resolve that question, the Court must initially determine whether the Plaintiff's claim must be analyzed under the Fourth or Fourteenth Amendment. Coy and Stutes have analyzed that claim under the Fourth Amendment,[11] while the Plaintiff argues, in the alternative, that those actions violated either the Fourth or the Fourteenth Amendment. For reasons which follow, this Court concludes that the Plaintiff's claim of excessive force arises under the Fourth Amendment and must be analyzed thereunder.

In *Graham v. Connor,* 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989), the United States Supreme

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[11] In their Reply Memorandum, Coy and Stutes suggest that the Plaintiff's excessive force claim should be resolved under the Cruel and Unusual Punishments Clause of the Eighth Amendment. This Court cannot agree. That constitutional provision is applicable only after an individual has been convicted. *See e.g., Whitley v. Albers,* 475 U.S. 312, 318, 89 L. Ed. 2d 251, 106 S. Ct. 1078 (1986). Since the Plaintiff had not been convicted, before the incident giving rise to this litigation, the Eighth Amendment is inapplicable.

Court rejected the argument that one generic standard was applicable to all constitutional claims arising out of the alleged use of excessive force. *Id.* at 393. Rather, the *Graham* Court held that held that, in addressing a claim of excessive force, a court must initially identify the precise constitutional provision that was allegedly infringed. *Id.* at 394. The Supreme Court held further that all claims of the unconstitutional use of excessive force, arising out of the seizure of an individual, are to be analyzed under the objective reasonableness standard of Fourth Amendment. The *Graham* Court wrote:

> Our cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins, and we do not attempt to answer that question today. It is clear, however, that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment. *See Bell v. Wolfish,* 441 U.S. 520, 535-539, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979). After conviction, the Eighth Amendment "serves as the primary source of substantive protection. . . in cases. . . where the deliberate use of force is challenged as excessive and unjustified." *Whitley v. Albers,* 475 U.S. [312, 327, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986)].

Id at 395 n. 10. Thus, if the Plaintiff were a pretrial detainee, when Coy allegedly used excessive force upon him, the Fourteenth Amendment would govern that claim, while the Fourth Amendment is applicable if Coy's actions occurred during the course of an arrest. In *McDowell v. Rogers,* 863 F.2d 1302 (6th Cir. 1988), the Sixth Circuit addressed the issue of when a seizure ends and pretrial detention begins, for purposes of deciding which constitutional provision governs a claim of excessive force. Therein, after the plaintiff had unsuccessfully attempted to cash stolen checks at a grocery store, he got into an altercation with the security guard at that store, following which he exited quickly. The security guard gave chase and was soon joined by a police officer, Officer Rogers, who caught and arrested the plaintiff. Officer Rogers placed the plaintiff in handcuffs, and he, the security guard and the plaintiff began walking back to the store. Before they had arrived at their destination, another officer, Officer Ross, drove by in his police cruiser. The plaintiff was placed in that vehicle and driven back to the store. When Officer Rogers arrived at that location, the plaintiff was taken out of that vehicle, so that Officer Rogers' handcuffs could be replaced with those of Officer Ross. The latter officer accomplished that task without incident. According to the plaintiff, as he was being put back in the police cruiser. Officer Ross beat him with his nightstick. The Sixth Circuit concluded that the plaintiff's claim of excessive force against that officer had to be analyzed under the Fourth Amendment, writing "the seizure which occurs when a person is arrested continues throughout the time the person remains in the custody of the arresting officers. *Robins v. Harum,* 773 F.2d 1004, 1010 (9th Cir. 1985)." 863 F.2d at 1306. Herein, the Plaintiff had been arrested by Stutes and Coy and remained in their custody in the booking area of the Xenia Police Station, when Coy

allegedly used excessive force on him. Therefore, in accordance with *McDowell*, this Court will apply the standards of the Fourth Amendment, when assessing the Plaintiff's § 1983 claim of excessive force in this litigation.

In *Graham*, the Supreme Court explained the contours of an excessive force claim under the Fourth Amendment:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *See Terry v. Ohio*, 392 U.S. [1, 20-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)]. The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested. *Hill v. California,* 401 U.S. 797, 28 L. Ed. 2d 484, 91 S. Ct. 1106 (1971), nor by the mistaken execution of a valid search warrant on the wrong premises, *Maryland v. Garrison,* 480 U.S. 79, 94 L. Ed. 2d 72, 107 S. Ct. 1013 (1987). With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," Johnson v. Glick, 481 F.2d [1028, 1033 (2nd Cir.), *cert. denied*, 414 U.S. 1033 (1973)], violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and

> rapidly evolving--about the amount of force that is necessary in a particular situation.
>
> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. *See Scott v. United States,* 436 U.S. 128, 137-139, 56 L. Ed. 2d 168, 98 S. Ct. 1717 (1978); *see also Terry v. Ohio, supra,* 392 U.S. at 21 (in analyzing the reasonableness of a particular search or seizure, "it is imperative that the facts be judged against an objective standard"). An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional. *See Scott v. United States, supra,* 436 U.S. at 138, citing *United States v. Robinson,* 414 U.S. 218, 38 L. Ed. 2d 427, 94 S. Ct. 467 (1973).

490 U.S. at 396-97.

Herein, it bears emphasis that, when determining whether the evidence raises a genuine issue of material fact as to whether Coy used excessive force, under the standards established in *Graham*, this Court must construe the evidence in the manner most favorable to Plaintiff, the party against whom summary judgment is sought. So construing the

evidence, this Court is compelled to conclude that there is a genuine issue of material fact. At Stutes' request, the Plaintiff raised one of his feet, so that the officer could ensure that drugs were not hidden on the bottom of that foot. The Plaintiff's foot came close to Stutes' face, and the officer grabbed it and pushed it away. Coy interpreted the Plaintiff's actions in that regard as an attempt to kick Stutes and tackled the Plaintiff, who was standing handcuffed at the time. As the two fell to the ground, with Coy on top of the Plaintiff, Coy told the Plaintiff that he would not permit him to kick one of his officers, and struck him in the face twice. While holding the Plaintiff's shirt collar. Coy proceeded to slam his head into the floor at least three times. Although Coy argues that he was required to use that force to gain control of the Plaintiff, a jury could find otherwise. Coy was on top of the Plaintiff, who was handcuffed when the incident occurred. There is no evidence that, while in that position, the Plaintiff presented a threat to Coy or to any other officer.

The second and final question presented by a claim of qualified immunity is whether the right in question has been clearly established. The Sixth Circuit has repeatedly indicated that the right to be free from the use of excessive force in the context of a seizure is clearly established. *See e.g.*, *Adams v. Metiva,* 31 F.3d 375, 386-87 (6th Cir. 1994).

Accordingly, the Court overrules the Motion for Summary Judgment of Coy and Stutes (Doc. # 71), to the extent that, with that motion, Coy seeks summary judgment on Plaintiff's § 1983 claim, alleging that the use of excessive force violated the Fourth Amendment.

Although there is no evidence that Stutes used excessive force, Plaintiff argues that liability can be imposed upon that officer, because he failed to prevent Coy from using such force. The Sixth Circuit has held that an officer, who has not personally violated an individual's constitutional rights by using excessive force, can be held liable, if he fails to intervene to prevent a fellow officer from committing a constitutional deprivation through the use of excessive force. *See e.g., Turner v. Scott,* 119 F.3d 425 (6th Cir. 1997); *Durham v. Nu'Man,* 97 F.3d 862 (6th Cir. 1996), *cert. denied,* 520 U.S. 1157 (1997). In *Turner*, the Sixth Circuit indicated that such liability could be imposed, only if, *inter alia*, the officer had both the means and the opportunity to prevent the harm from occurring. 119 F.3d at 429. Herein, the evidence does not raise a genuine issue of material fact as to whether Stutes had the opportunity to intervene, in order to stop Coy's actions. Stutes' attention had been diverted by Jabbar, who at the pertinent time had gotten out of his chair in which he had been sitting and had started to walk toward the altercation. By the time that Stutes' attention refocused upon the altercation between Coy and Plaintiff, Coy was telling the Plaintiff to calm down and proceeding to help him to his feet.

Accordingly, the Court sustains the Motion for Summary Judgment of Coy and Stutes (Doc. # 71), to the extent that, with that motion, Stutes seeks summary judgment on Plaintiff's § 1983 claim, alleging that he can be held liable for failing to prevent Coy from using excessive force in violation of the Fourth Amendment.

IV. Xenia Defendants' Motion for Summary Judgment (Doc. # 78)

With this motion, the Xenia initially argues that it is entitled to summary judgment on Plaintiff's § 1983 claims against it, because Coy and Stutes did not violate his constitutional rights.[12] It is axiomatic that liability under § 1983 cannot be imposed upon a municipal employer, such as Xenia, unless one of its employees has committed a constitutional tort. *See Scott v. Clay County, Tennessee,* 205 F.3d 867, 879 (6th Cir. 2000) (citing *City of Los Angeles v. Heller,* 475 U.S. 796, 89 L. Ed. 2d 806, 106 S. Ct. 1571 (1986)). Given that this Court has concluded that Stutes is entitled to summary judgment on the Plaintiff's § 1983 claim against him, Xenia is also entitled to summary judgment, to the extent that the Plaintiff claims liability upon that

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[12] The City Commissioners, who have been sued in their official capacities, argue that they are entitled to summary judgment, since the claims against them are nothing more than claims against Xenia. Plaintiff has not responded to that request, and the Court agrees. It is well-settled, that a claim against an officer or employee of a governmental entity, in his or her official capacity, is a claim against the governmental entity itself. *See e.g., Kentucky v. Graham,* 473 U.S. 159, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985). Thus, the Plaintiff's claims against the City Commissioners merely restate his claims against Xenia. Since that municipality is a Defendant in this litigation, the Court sustains the Xenia Defendants' Motion for Summary Judgment (Doc. # 78), to the extent that, with that motion, the City Commissioners seek summary judgment. *Accord, H.J. v. Hamilton County, Ohio,* 707 F. Supp. 314, 318-19 (S.D.Ohio 1989) (dismissing official capacity claims against county commissioners, because county was a defendant).

municipality for Stutes' deprivations of his constitutional rights. However, since the existence of genuine issues of material fact have prevented this Court from concluding that Coy is entitled to summary judgment, the Court rejects Xenia's argument that it is entitled to summary judgment on the Plaintiff's § 1983 claim, because Coy did not violate his constitutional rights.

In order for liability to be imposed upon a governmental employer, the constitutional tort of its employee must have been caused by a policy or custom of the governmental employer. *See Monell v. New York City Dept. of Social Serv.,* 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). In *Berry v. City of Detroit,* 25 F.3d 1342 (6th Cir. 1994), *cert. denied*, 513 U.S. 1111, 130 L. Ed. 2d 786, 115 S. Ct. 902 (1995), the Sixth Circuit reviewed the holding of the Supreme Court in that case:

> Any discussion of municipal liability under § 1983 begins with *Monell v. Department of Social Services,* 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). In *Monell*, the Supreme Court held that municipalities can be sued directly under § 1983 where the action of the municipality itself can be said to have caused the harm, as when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690. Municipal liability for the actions of employees may not be based on a theory of respondeat superior. *Monell* went on to clarify

that municipal liability may be predicated upon grounds other than explicit expressions of official policy:

> Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision making channels. *Id* at 690-91.

Id at 1345. In *Pembaur v. City of Cincinnati,* 475 U.S. 469, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986), the Supreme Court noted that "the 'official policy' requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Id.* at 479-80.

Based upon *Monell* and its progeny, Xenia argues that it is entitled to summary judgment on Plaintiff's § 1983 claims, because the evidence does not raise a genuine issue of material fact as to whether it has a policy or custom that officers should use excessive force to seize suspects. The

Plaintiff has not responded to that argument.[13] The evidence supplied by Xenia in support of its request for summary judgment demonstrates that there is no genuine issue of material fact on this question. When Coy allegedly used excessive force on Plaintiff, Xenia had an express policy which limited the use of force by officers when it was necessary to defend themselves or others, to overcome resistance to an arrest or to prevent an escape. Indeed, Coy was fired by Xenia for violating that policy. Moreover, the evidence established that Coy received training in the use of force, both when he was initially hired as an officer and periodically throughout his employment.

The Plaintiff does argue, however, that liability can be imposed on Xenia for the actions of Coy, because Judge

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[13] The Plaintiff does argue that the evidence raises a genuine issue of material fact as to whether Xenia has a policy or custom of failing to train officers with respect to their obligation to intervene to prevent a fellow officer from using excessive force. Thus, according to the Plaintiff, Xenia can be held liable, under *Monell* and its progeny, for Stutes' failure to intervene to prevent Coy from using excessive force. To support that argument, Plaintiff has submitted McCauley's two affidavits. The Xenia Defendants have moved to strike those affidavits (*see* Docs. # 84 and # 89), motions which this Court has addressed above. In addition, the Xenia Defendants take the position that the evidence does not raise such an issue of fact. Given that this Court has concluded above that Stutes cannot be held liable for failing to intervene to stop Coy's use of excessive force, this Court finds it unnecessary to address the parties' arguments as to whether liability can be imposed on Xenia for Stutes' actions, including their arguments pertaining to McCauley's supplemental affidavit. *See Scott v. Clay County, supra.*

Goldie hired him as a bailiff, after he had been discharged as a police officer. For reasons which follow, this Court concludes that the decision of Judge Goldie to hire Coy cannot serve as the basis for imposing liability upon Xenia for the actions of Coy. Under Ohio law, a municipal court judge has the authority to appoint bailiffs. Ohio Rev. Code § 1910.32(A)(2). In her affidavit, Judge Goldie has confirmed that she made the decision to hire Coy, without input from Xenia, its officers or employees. Moreover, a municipal court is a creature of the state rather than the municipality in which it is located. *See Foster v. Walsh,* 864 F.2d 416, 418-19 (6th Cir. 1988) ("The Akron Municipal Court is part of the Ohio state court system, established by the Ohio state legislature. Ohio Rev. Code § 1901.01. It is subject to the supervision of the Ohio Supreme Court. Ohio Const., Art. IV, § 5. The municipal court may not be abolished by the city council, nor may the council expand or restrict the court's jurisdiction.").[14] *See also, Mumford v. Basinski,* 105 F.3d 264, 268-270 (6th Cir. 1997) (holding that Domestic Relations Division of Lorain County Common Pleas Court is an arm of the state, rather than of Lorain County). In *Sampson v. City of Xenia,* 108 F. Supp. 2d 821, 1999 WL 33100502 (S.D.Ohio 1999), this Court held that the City of Xenia could not be held liable for an alleged constitutional deprivation committed by a clerk of the Xenia Municipal Court, since that court was not an arm of the municipality. *See also, Mace v. City of Akron,* 989 F.

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[14] Section 1901.02 of the Ohio Revised Code defines the territorial jurisdictions of the various Municipal Courts in Ohio, including the Xenia Municipal Court, which includes ten Townships within Greene County. Thus, the Xenia Municipal Court is not coextensive with the territorial limits of the municipality in which it is located.

Supp. 949, 956-957 (N.D.Ohio 1998) (recognizing that "municipal courts, not municipalities, retain the authority to make policy decisions concerning court employees"). Since the Xenia Municipal Court is not an arm of the City of Xenia, and, further, given that Judge Goldie exercised her statutory authority to hire Coy, this Court concludes that the actions of that judicial officer in that regard do not serve as the basis for imposing liability upon Xenia for the alleged use of excessive force by Coy.

Accordingly, the Court sustains the Xenia Defendants' Motion for Summary Judgment (Doc. # 78), to the extent that, with that motion, Xenia seeks summary judgment on the Plaintiff's § 1983 claims, with which he seeks to impose liability upon it for the actions of Coy.

Prindle, who was a Lieutenant in the Xenia Police Department at the time the incidents giving rise to this litigation occurred,[15] argues that he is entitled to summary judgment on the Plaintiff's § 1983 claim. This Court agrees. Plaintiff contends that liability can be imposed upon Prindle, because he failed to supervise Coy and Stutes. In *Shehee v. Luttrell,* 199 F.3d 295 (6th Cir. 1999), *cert. denied*, 530 U.S. 1264, 120 S. Ct. 2724, 147 L. Ed. 2d 988 (2000), the Sixth Circuit restated the standards under which liability can be imposed on a supervisor, under § 1983, for the constitutional tort committed by an employee under his supervision:

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[15] Prindle is currently the Chief of Police for Xenia; however, that position was occupied by Danny O'Malley when the incidents giving rise to this litigation occurred.

> a supervisory official's failure to supervise, control or train the offending individual is not actionable unless the supervisor "either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers."

Id at 300 (quoting *Hays v. Jefferson County, Kentucky*, 668 F.2d 869, 874 (6th Cir. 1982)). Herein, there is simply no evidence that Prindle encouraged or in some other manner directly participated in the use of excessive force by Coy.[16] In addition, although Prindle was not responsible for disciplining Coy for his actions, he did participate in the internal investigation, the result of which was that Coy was fired. Accordingly, the Court sustains the Xenia Defendants' Motion for Summary Judgment (Doc. # 78), to the extent that, with that motion, Prindle seeks summary judgment on the Plaintiff's § 1983 claim.

Xenia also argues that it is entitled to summary judgment on the Plaintiff's state law claims, because it is immune under state law. This Court agrees. Under Ohio Revised Code § 2744.02(B), a governmental entity can be held liable for the torts committed by its employees under

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[16] Given that the Court has concluded that Stutes' did not violate the Plaintiff's constitutional rights, there is no basis for imposing supervisory liability on Prindle for Stutes' actions.

only five circumstances, to wit: the negligent operation of a motor vehicle, the negligent performance of an act in connection with a proprietary function, the failure to keep public roads open and free from nuisance, the failure to keep public buildings and grounds free from physical defects, and where liability is expressly imposed by other provisions in the Ohio Revised Code.[17] Since none of those exceptions is remotely applicable, liability cannot be imposed upon Xenia for the state law torts allegedly committed by Coy and Stutes. Accordingly, the Court sustains the Xenia Defendants' Motion for Summary Judgment (Doc. # 78), to the extent that, with that motion, Xenia seeks summary judgment on the Plaintiff's state law claims.

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[17] Although the Plaintiff has not opposed this branch of the Xenia Defendants' Motion for Summary Judgment (Doc. # 78), he has alleged with his Eighth Claim for Relief that § 2744.02(B) is unconstitutional because it arbitrarily distinguishes between proprietary and governmental functions. Even if that statutory distinction between the two types of functions performed by a governmental entity could be considered unconstitutional, it is apparent that the Plaintiff has not suffered an injury, as a result of that legislative line drawing. Section 2744.02(B) is applicable to both proprietary and governmental functions, the only difference being that liability can be imposed when an employee acts negligently when performing a proprietary function. Herein, the Plaintiff seeks to impose liability on Xenia for the intentional tort allegedly committed by Coy and Stutes. Ohio courts have held that § 2744.02(B) does not permit liability to be imposed upon a municipality for the intentional torts committed by its employees. *See e.g., Abdalla v. Olexia,* 1999 Ohio App. LEXIS 4806, 1999 WL 803592 (Ohio App. 1999); *Ellithorp v. Barberton City Sch. Dist. Bd. of Ed.,* 1997 Ohio App. LEXIS 3053, 1997 WL 41633 (Ohio App. 1997).

Based upon the foregoing, the Court sustains the Xenia Defendants' Motion for Summary Judgment (Doc. # 78), in its entirety.[18]

As a result of this Decision, the only claims remaining in this litigation are Plaintiff's § 1983 claim against Coy, alleging that he used excessive force in violation of the Fourth Amendment; Plaintiff's state, common law claim of assault and battery against Coy; and Plaintiff's state, common law claim of false arrest against Coy and Stutes.

September 15, 2000

/s/_____
WALTER HERBERT RICE, CHIEF JUDGE
UNITED STATES DISTRICT COURT

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[18] Given that ruling, the Court overrules, as moot, the Xenia Defendants' Motion to Compel Discovery (Doc. # 77).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

00-4257

[Filed June 5, 2002]

GLENN W. PHELPS, JR.,
Plaintiff-Appellee,

v.

ROBERT M. COY, JR.,
Defendant-Appellant.

CHRISTIN STUTES, ET AL.,
Defendants.

JUDGES:
BEFORE: SILER, CLAY, and GIBSON,* Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the

* Hon. John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-3-98-369

GLENN W. PHELPS, JR., *Plaintiff,*

v.

ROBERT M. COY, JR., et al., *Defendants*

Deposition of GLENN W. PHLEPS, JR., Plaintiff herein, called by the Defendants for cross-examination pursuant to the Rules of Civil Procedure, taken before me, Jennifer J. Flynn, a Notary Public in and for the State of Ohio, at the offices of David M. Deutsch Co., LPA, 208 West Monument Avenue Dayton, Ohio, on Wednesday, April 7, 1999, at 9:08 o'clock a.m.

Q. So you don't know if you had any kind of contact with Officer Stutes at any time since the day of the incident?

A. I can't recall.

Q. Did you have to get stitches in your lip?

A. No, but it was kind of - - I think it was kind of like swelled up and busted on the inside (indicating). I didn't get no stitches though.

Q. Did you have a black eye?

A. I had a slight black eye.

Q. Did you have any cuts?

A. Swollen, Swollen (indicating).

Q. Did you have any cuts on the back of your head?

A. No. Just a headache.

Q. Was the back of your head swollen?

A. Yes, it was kind of swollen, but I couldn't - - I could feel the lumps in it. I could feel it where - - you know, where he hit my head, it was kind of like lumps or swollen.

Q. But the only blood was from your lip?

A. Lip, yes, and I think - - I'm not for sure - - my eye was scratched or something. I'm not - - I can't recall.